

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:
Index Number : 600340/2007

FBEM PART _____

VERAS INVESTMENT PARTNERS

vs

AKIN GUMP STRAUSS HAUER

Sequence Number : 001

D

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 28 2007

NEW YORK
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/27/07

1 
HON. BERNARD J. FRIED s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FBEM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : Part 60

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VERAS INVESTMENT PARTNERS, LLC;
VERAS INVESTMENT GROUP, LP; VERAS CAPITAL
PARTNERS, LLP; VERAS CAPITAL PARTNERS (QP),
LP; VERAS ENHANCED YIELD (QP), LP;
VERAS CAPITAL PARTNERS OFFSHORE, LTD.;
VERAS ENHANCED YIELD OFFSHORE, LTD.;
VERAS CAPITAL MASTER FUND; VEY PARTNERS
MASTER FUND; JAMES R. MCBRIDE; KEVIN D. LARSEN;
and BRIAN VIRGINIA,

Plaintiffs,

Index No.
600340/2007

-against-

AKIN GUMP STRAUSS HAUER & FELD LLP,

Defendant.

FILED

SEP 28 2007,

NEW YORK
COUNTY CLERK'S OFFICE

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APPEARANCES:

For Plaintiffs:

Flemming Zulack Williamson
Zauderer LLP
One Liberty Plaza, 35th Floor
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Of Counsel: Linda M. Marino, Esq.
Gerald G. Paul, Esq., Megan P. Davis,
Esq.

For Defendant:

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(212) 336-2000

Of Counsel: Philip R. Forlenza, Esq.,
Thomas W. Pippert, Esq., Karla G.
Sanchez, Esq., Kristen Liebensperger,
Esq.

FRIED, J.:

This is a motion by the defendant law firm Akin Gump Strauss Hauer & Feld LLP
(Akin Gump) to dismiss the Second, Third, Fifth, Seventh and Ninth causes of action alleged
in plaintiffs' complaint, as redundant, pursuant to CPLR 3211 (a) (7), and to dismiss the
Sixth cause of action

alleged in plaintiffs' complaint, in part, pursuant to CPLR 3211 (a) (1), to the extent that plaintiffs allege that defendant failed to disclose conflicts of interest.

Plaintiffs, Veras Investment Partners, LLC, and Veras Investment Group, LP (the managing entities), are the managing partners for the plaintiff hedge funds, Veras Capital Partners LP, Veras Capital Partners (QP), LP, Veras Enhanced Yield PQ, LP, Veras Capital Partners Offshore, LTD, Veras Enhanced Yield Offshore LTD. Plaintiffs Veras Capital Master Fund and Vey Partners Master Fund, are entities created to facilitate the hedge funds' transactions. The entities are referred to together herein as "the Veras Entities." Plaintiffs James R. Mc Bride and Kevin D. Larson are the original principals of the management entities. Plaintiff Brian Virginia joined the management entities in December 2001.

According to plaintiffs' complaint, McBride and Larson retained Akin Gump on or about September 27, 2001, to advise and assist them in forming a hedge fund or funds to engage in "market timing" trading strategies, which are designed to take advantage of inaccuracies in information about mutual fund values, by exploiting the time lag in the posting information on, inter alia, "sticky assets" between the close of business in one market (i.e. Japan), and the opening of business in another (i.e. New York). To take advantage of this strategy, plaintiffs were required to execute trades after the close of business of certain markets, and to create subsidiary entities to by-pass certain mutual fund trading restrictions. Plaintiffs' complaint alleges that Akin Gump partner, Elliot D. Raffkind, who was ranked number one on the "Hedge World Legal Counsel League Table, 4Q2000," and other attorneys at Akin Gump, on a number of occasions, as detailed more fully in the complaint, assured plaintiffs that their trading activities and strategies did not violate any

applicable rules or regulations, and more likely than not, were not subject to sanction. Plaintiffs' complaint alleges that in accordance with the terms of the September 27, 2001 retainer agreement, Akin Gump set up or created all of the Veras Entities, prepared all organizational documents, prepared all client documentation and disclosures, and was responsible for processing and maintaining all regulatory documentation and filings. According to plaintiffs' complaint, Akin Gump created most of the initial Veras Entities between October and December 2001, and the funds commenced operation between January and March of 2002, and operated successfully from January 2002 through early September 2003, attracting approximately \$1 billion dollars of investor equity.

Plaintiffs' complaint alleges that the New York State Attorney General's office (the NYAG) and the Securities and Exchange Commission (SEC) began investigating "late trading" in August 2003. Late trading is defined as placing orders for mutual funds after the close of the stock market, 4PM Eastern Standard Time, and purchasing or selling the shares at the day's net asset value rather than at the net asset value for the following day. On September 11, 2003 and September 15, 2003, the NYAG and the SEC served subpoenas on the management entities, seeking documents and information relating to their late trading and market timing. Shortly thereafter, in October 2003 and November 2003, one of the Veras management entities came under investigation by the Texas Securities Board (TSB) and the Commodity Futures Trading Commission (CFTC). The TSB determined that the licensing or filing instruments for Veras Investment partners, LLC and MC Bride were not accurate and up-to-date, and that Larson's registration with the Texas Securities Commissioner had

lapsed on or about January 2003. Plaintiffs allege that it was Akin Gump's responsibility to assure the accuracy and timeliness of those filings.

Plaintiffs' complaint alleges that Aiken Gump undertook to represent plaintiffs in relation to the NYAG, SEC, TSB and CFTC investigations without disclosing that they had an inherent conflict of interest that was not waivable by plaintiffs, as clients, resulting from the fact that Akin Gump, at all times advised and assisted plaintiffs in carrying out the activities that were under investigation. Plaintiffs allege that Akin Gump, simultaneously undertook the representation and defense of Raffkind, and that these conflicts of interest adversely affected its ability to defend plaintiffs, and caused Akin Gump to place its own interests above those of plaintiffs by, among other things, not providing plaintiffs with the opinion letter it promised but never delivered, and not advising plaintiffs of the "advice of counsel" defense.

Plaintiffs' complaint alleges that as a result of Akin Gump's "innumerable failures in its representation," plaintiffs were forced to liquidate and discontinue operation of the hedge funds, and to pay more than \$36 million dollars to resolve the investigations. Plaintiffs further allege, that as a result of Akin Gump's innumerable failures in representation, plaintiffs have been exposed to class action law suits by investors in certain mutual funds, have lost hundreds of millions of dollars in past and future profits, have paid Akin Gump approximately \$5 million dollars for its faulty advice, and will have to pay millions more in future legal representation to extricate themselves from the position that Akin Gump placed them in.

Plaintiffs' complaint asserts eleven causes of action. The first, second and third causes of action are for legal malpractice, gross negligence, and negligent misrepresentation, respectively, arising out of advice and services performed in connection with the set up and functioning of the hedge funds. The fourth cause of action for legal malpractice, and the fifth cause of action for gross negligence, arise out of Akin Gump's alleged failure to maintain proper licensing or registration materials. The sixth cause of action, for fraud, the seventh cause of action for breach of fiduciary duty, the eighth cause of action for legal malpractice, the ninth cause of action for gross negligence, and the tenth and eleventh causes of action alleging violation of the Texas Deceptive Trade Practices-Consumer Protection Act, arise out of Akin Gump's defense and representation of plaintiffs in connection with the NYAG, SEC, TSB and CFTC investigations.

With respect to the sixth cause of action for fraud, plaintiffs' complaint alleges that Akin Gump made material misrepresentations of fact when, among other things, it assured plaintiffs that its interests were aligned with plaintiffs, and that any potential conflicts of interest were manageable. Plaintiffs allege that Akin Gump fraudulently failed to advise plaintiffs of the inherent and unwaivable nature of the conflicts of interest, and intentionally and purposefully acted to place its own interests above those of plaintiffs by, among other things, purposefully omitting to present and "sweep[ing]...under the rug" the advice of counsel defense, withholding evidence, waiving plaintiffs' privilege, and advising plaintiffs to do things, and make compromises that were not in plaintiffs' best interest, all in order to avoid being brought into question for its own participation in the underlying transactions.

Defendant's motion, pursuant to CPLR 3211 (a) (7), to dismiss plaintiffs' second, fifth and ninth causes of action, for gross negligence, the third cause of action for negligent misrepresentation and the seventh cause of action, for breach of fiduciary duty, as redundant of the legal malpractice claims, is granted. It is well settled, in this Department, that gross negligence, negligent misrepresentation, and breach of fiduciary duty claims, arising out of the same set of operative facts, and seeking the same damages or relief, as a viable legal malpractice claim, are redundant, and subject to dismissal pursuant to CPLR 3211 (a) (7) (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; *InKine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151 [1st Dept 2003]; *Mecca v Shang*, 258 AD2d 569 [2d Dept 1999]). As accurately outlined by defendant, the second cause of action asserted in plaintiffs' complaint for gross negligence, and the third cause of action for negligent misrepresentation, arise out of the identical facts, and seek the same relief as plaintiffs' first cause of action for malpractice. The fifth cause of action for gross negligence and the seventh cause of action for breach of fiduciary duty arise out of the same operative facts, and seek the same relief, as the fourth cause of action for malpractice, and the ninth cause of action for gross negligence arises out of the same facts, and asserts damages identical to the facts and damages alleged under the eighth cause of action for legal malpractice. Plaintiffs' argument, that the claims should be reviewed under Texas law, does not mandate a different result (*see Camp v RCW & Co., Inc.*, 2007 WL 1306841, *5 [SD Tex 2007], *quoting Goffney v Rabson*, 56 SW 3d 186, 190 [Tex App, Houston 2001][“Texas law does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action”]; *see also Aiken v Hancock*, 115 SW 3d 26, 28 [Tex App, San Antonio

2002]; *Ersek v Davis & Davis, P.C.*, 69 SW 3d 268, 274 [Tex App, Austin 2002]). Plaintiffs' request for leave to amend the eighth cause of action is denied, as the proposed amendment does not cure the redundancy (*see Feldman v Jasne*, 294 AD2d 307 [1st Dept 2002]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]).

That portion of defendants' motion which seeks partial dismissal of plaintiffs' sixth cause of action for fraud, on documentary evidence, pursuant to CPLR 3211 (a) (1), is denied. On a motion pursuant to 3211 (a) (1), the court must accept the complaint's factual allegations as true, according plaintiffs the benefit of every possible favorable inference, and dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Arnav Indus. Inc., Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d at 271-71). The documentary evidence relied upon by the defendant in this matter consists of a June 28, 2004 letter executed by McBride on behalf of the Veras entities, and by McBride, Larson and Virginia in their individual capacities, acknowledging the existence of potential conflicts of interest, including but not limited to those alleged in the instant complaint. Defendants also annex various drafts of the letter. All drafts were prepared in or around June 2004, after the individual plaintiffs retained independent counsel.

The document, executed nearly a year after the investigations commenced, has little probative value with respect to plaintiffs' allegations that, when Akin Gump undertook plaintiffs' defense in or around September 2003, it knowingly and purposefully failed to

disclose inherent and nonwaivable conflicts of interest, or with respect to acts occurring prior to the negotiation or execution of the letter. Plaintiffs' allegations also raise issues of fact with respect to whether the consent letter is effective in these circumstances (*see Kelly v Greason*, 23 NY2d 368, 378-79 [1968][in certain situations, there can be no effective consent]; *see also, e.g. Parklex Assoc. v Parklex Assoc.*, 15 Misc 3d 1125(A), 2007 WL 1203617, *5 [Sup Ct, Kings County 2007][attorneys could not rely on purported waiver of conflict of interest where such conflict could subject an attorney to disciplinary action under DR-105, 22 NYCRR §1200.24(c)]; *Booth v Continental Ins. Co.*, 167 Misc 2d 429, 439 [Sup Ct, Westchester County 1995][full disclosure and consent does not insulate an attorney where the conflict of interest affects or appears to affect the attorney's obligations]). Finally, in light of defendant's failure to demonstrate a right to relief based upon documentary evidence, it is not necessary, at this time, to address the issues of fact raised by plaintiffs' belated claims of coercion.

Accordingly, for the reasons stated above, it is:

ORDERED, that defendant's motion, pursuant to CPLR 3211 (a) (7) is granted, and the Second, Third, Fifth, Seventh and Ninth causes of action alleged in plaintiffs' complaint are dismissed; and it is further

ORDERED, that defendant's motion relating to the Sixth cause of action, pursuant to CPLR 3211 (a)(1) is denied, and it is further

ORDERED, that plaintiffs' request for leave to amend the complaint is denied; and it is further

ORDERED, that defendant is directed to serve an answer to the balance of the complaint, consisting of the First, Fourth, Eighth, Tenth and Eleventh causes of action, within 10 days after service of a copy of this order with notice of entry.

Dated: 9/27/07

ENTER:


JSC

HON. BERNARD J. FRIED

FILED
SEP 28 2007
NEW YORK
COUNTY CLERK'S OFFICE